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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

HUMBERTO PEREZ,

Defendant and Appellant.

F072491

(Super. Ct. No. 14CM2668)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Carla J. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Peña, J.

Humberto Perez entered into a plea agreement that required him to plead no contest to a felony count and a misdemeanor count, and resulted in two felony charges being dismissed. Sentencing was left to the trial court's discretion.

At the sentencing hearing, defense counsel argued the trial court should follow the probation department's recommendation and place Perez on probation. The trial court disagreed and sentenced him to a midterm of four years for the felony count. It also ordered him to register as a sex offender pursuant to the discretionary provisions of Penal Code section 290.006.¹

Perez argues the trial court abused its discretion in making its sentencing choices. We disagree and will affirm the sentence. However, we will vacate the sex offender registration requirement because the trial court failed to comply with section 290.006 by stating on the record the reason for its choices. We will remand the matter to the trial court to permit it to exercise its discretion and, should it choose to require Perez to register as a sex offender, to comply with the requirements of the statute.

FACTUAL AND PROCEDURAL SUMMARY

The second amended complaint charged Perez with rape by intoxication (§ 261, subd. (a)(3)), unlawful sexual intercourse with a person under the age of 16 (§ 261.5, subd. (d)), willful infliction of physical pain or mental suffering (§ 273a, subd. (a)), and misdemeanor furnishing a minor with alcohol (Bus. & Prof. Code, § 25658, subd. (a)).

Perez entered a no contest plea to counts three and four in exchange for dismissal of the remaining charges. The trial court sentenced Perez to the midterm sentence of four years for the felony, and imposed a concurrent term of 180 days for the misdemeanor. In addition, the trial court ordered that Perez register as a sex offender.

The information available to the trial court at the sentencing hearing forms the basis for Perez's arguments. Accordingly, we will summarize this information.

¹ All statutory references are to the Penal Code unless otherwise stated.

The trial court asked for a factual basis for the plea at the hearing at which Perez entered his plea. The prosecutor represented that if the case proceeded to trial the evidence would show that, on the day in question, 21-year-old Perez picked up the 15-year-old victim and her 16-year-old friend. He drove to a liquor store where he purchased alcohol for the two girls (two bottles each). He then drove the two girls to a park where the alcohol was consumed. The victim became very drunk to the point she could not walk well and was vomiting. Both the victim and her friend described her state of inebriation as 10 on a scale of 1 to 10.

The victim felt pressure on her vaginal area and pushed Perez away. The victim's friend saw Perez on top of the victim. Both had their undergarments off or pulled down.

Testing and examination revealed Perez's DNA and sperm were deposited on the victim's inner thighs and on swabs from the victim's anus. Injury was discovered to the victim's posterior fourchette, which was consistent with vaginal intercourse. Both Perez and defense counsel agreed that if the case proceeded to trial the People would be able to present evidence to support the facts recited by the prosecutor.

In addition to the prosecutor's offer of proof, the trial court had before it two reports from the probation department. The first is a bail review report. As relevant, this report stated the victim was at her friend's house spending the night. Her friend called a guy known as "JJ," later identified as Perez, to come pick up the girls. Perez took them to the liquor store and then the park. The victim became intoxicated and could not walk on her own. Perez began "making out" with the victim's friend, and then the victim recalled going behind a tree with Perez. The victim remembered feeling pressure in her vaginal area and pushing Perez away.

The victim's friend repeated much the same report of events. She added that when Perez began kissing and fondling her she told him to stop. That is when Perez took the victim behind the tree and the friend observed the two having "sex."

The probation report recited essentially the same facts as contained in the bail review report. However, when Perez talked with the police he denied having any sexual contact with either the victim or her friend.

When interviewed prior to the sentencing hearing, Perez indicated he lived with his parents, shared custody of his five-year-old daughter, and had obtained his high school diploma. He was currently unemployed and receiving unemployment benefits, although he had worked in a fruit packing house recently. He had a prior conviction for a felony as a juvenile, and was prosecuted for a violation of probation on one occasion. He had not been arrested for any offenses as an adult.

Perez also submitted a written statement which was attached to the probation report. He began his statement describing his admiration and dreams of pursuing a college degree, but claimed it was difficult growing up in the Salinas valley. He also informed the court he has a daughter who provides the main motivation in his life to work hard and be a good father. He asserted he provides for his daughter and would like to be there for her as she grows up.

His only reference to the crimes was found in the third paragraph of a four paragraph statement. In full, this paragraph reads, “Therefore, I would like to deeply apologize for the mistakes I have committed. It is hard dealing with such a situation as this one. I’m sorry for the wrongful mistake of providing alcohol to a minor, something it should of never have happened. I would also like to apologize to the victims for this error. I understand that alcohol was involved and if it wasn’t for the alcohol I wouldn’t be in this situation. I am not an alcoholic or a criminal. It was a night where I put myself through a situation which was not thought through.”

He then concluded his statement by reiterating recognition of his “mistake” and asking for a second chance so he could provide for his daughter. He stated he was enrolled in Alcoholics Anonymous classes, and hoped to enroll in college classes so he could be a role model for his child and siblings.

Eight letters were also submitted on Perez's behalf by his family and friends urging the trial court to give him a second chance and place him on probation.

Finally, the victim submitted a letter detailing the severe psychological trauma caused by this incident and the lingering problems from which she continues to suffer.

The probation report recommended Perez's sentence be suspended, and he be placed on probation.

DISCUSSION

Perez argues the trial court erred when it failed to place him on probation, and when it ordered him to register as a sex offender. If either argument is deemed forfeited, Perez argues he received ineffective assistance of counsel.

Sentencing

Perez argues the trial court erred when it imposed a prison sentence because it based its decision on factors that were inapplicable to the sentencing choice. We conclude the trial court did not abuse its discretion.

We review a trial court's decision to grant or deny probation under the deferential abuse of discretion standard. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) "To establish abuse, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) "In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary." (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896, abrogated on other grounds by amendment to California Rules of Court, rule 4.406(b).)

The trial court addressed its sentencing choice twice during the sentencing hearing. At the commencement of argument, the trial court informed both counsel its tentative position was to deny probation and impose a midterm sentence.

“And what I have as the circumstances in this case is that the victim was 15 years old, the defendant picked up the victim along with a friend and drove them to Hidden Valley Park. They stayed there for awhile. Then the defendant left and purchased alcohol for these children. And the victim became extremely intoxicated. And then she remembers going behind a tree with the defendant, and that is where he raped her. Then he denied raping the victim. The Court is of the opinion that this is predatory type behavior.

“And I’m also concerned with Mr. Perez’ statement, he goes on about what he wants to do with his life, and there’s one word or one sentence in there he states he’d like to apologize to the victim for the error.

“So the Court is not inclined to follow the recommendation and is inclined to send Mr. Perez to prison for the midterm and have him register as a sex offender. The Court is, again, this looks like predatory type information – or strike that, predatory type behavior, where he has sought out 15-year-olds and drove them to a public place and proceeded to rape this person behind a tree. To say the least it’s undignified. And it’s, if nothing else, somebody should feel safe in a park. Shouldn’t have to feel as though there’re going to get raped in a park.

I don’t know if this was in the daytime or nighttime, but I can – those are just my thoughts.”

The trial court then provided both counsel with an opportunity to address sentencing. Defense counsel argued the trial court should adopt the recommendation of the probation department, while the prosecutor argued a prison sentence was appropriate in this case. Defense counsel stressed that Perez had been out of custody for over a year and had been compliant with all requirements imposed on him. He argued that the facts suggested this was not a forcible rape, but emphasized that alcohol played a major role in the events that occurred. Finally, he emphasized that Perez acknowledged his wrongful behavior, and expressed remorse for his actions. He explained Perez sought probation so he could support his family and help raise his daughter.

The trial court then sentenced Perez.

“In this case the nature, seriousness, and circumstances of the crime are more serious as compared to other instances of the same crime in that the victim in this case was so intoxicated she could not care for herself. She

was – and it was the defendant that gave her the alcohol. The victim was vulnerable in that she was a minor. And she consumed so much alcohol that she became physically ill and was unable to protect herself and was unable to at the time comprehend what was happening. The defendant was an active participant in that he provided the alcohol to the victim and then he raped her. The defendant has been adjudicated a ward of the court back in 2007 for an auto theft where he violated his probation.

“The Court does find that Mr. Perez is a danger to the community based on his predatory type behavior. The Court does not – denies probation.

“The circumstance in aggravation include that he was convicted of other crimes for which consecutive sentences could have been imposed, but for which concurrent sentences are being imposed; his prior performance [on probation] has been unsatisfactory.

“The circumstances in mitigation is that he has an insignificant prior record; he did acknowledge wrongdoing at an early stage of the proceedings, however, that is diluted by the fact that he never – he’s not remorseful for what he has done, he’s not actually – he’s remorseful for the alcohol, but not the rape, and he has not addressed that.

“The court is willing to impose the mid term of four years in state prison.”

There is nothing in the trial court’s analysis and decision that suggests it acted in an arbitrary or capricious manner. Perez argues the trial court erred because it relied on lack of remorse in reaching its conclusion. But the cases on which Perez relies address the use of lack of remorse in the context of imposition of an aggravated sentence. The issue is whether the trial court abused its discretion in refusing to impose probation. The trial court did not impose an aggravated term of imprisonment.

Perez also seems to argue the victim had not been raped. The evidence is more than sufficient to support the trial court’s conclusion that a rape occurred. Perez apparently concedes the victim was too intoxicated to consent to the intercourse, but asserts there was no evidence that he penetrated the victim’s vagina. The facts provided to support the plea included recovery of Perez’s sperm from the victim’s thighs and anal region, and evidence that the victim’s posterior fourchette was injured. The parties

agreed that such injury was indicative of vaginal intercourse. These facts provide substantial evidence that penetration occurred.

Moreover, Perez's assertion that the court's conclusion that he did not show remorse for raping the victim misses the point. While the trial court found that Perez raped the victim, it was undisputed that *at a minimum*, Perez attempted to have sex with an intoxicated 15-year-old girl. Perez was seen by the victim's friend on top of the victim with his pants around his ankles, and the victim's skirt pulled up. Yet, in his letter attached to the probation report, Perez only apologized for having given alcohol to the minors, not for, at a minimum, attempting to take advantage of the inebriated victim. This demonstrates not only a lack of remorse, but also suggests that if Perez were placed on probation he would be a danger to society. He may very well again attempt to take advantage of a child in the same manner since he apparently did not feel he had done anything for which he should apologize, i.e. he had no remorse for his actions.

Finally, the cases cited by Perez provide no support for his argument. As stated above, the cases which stand for the proposition that lack of remorse may be not be used as a factor to aggravate a sentence under certain circumstances (*People v. Holguin* (1989) 213 Cal.App.3d 1308; *People v. Leung* (1992) 5 Cal.App.4th 482 (*Leung*)) are inapposite because the issue is a denial of probation, not imposition of an aggravated sentence.

People v. Key (1984) 153 Cal.App.3d 888 discussed in dicta the use of a defendant's lack of remorse to impose an aggravated sentence. It states that lack of remorse is properly used as an aggravating factor where the defendant acknowledges guilt but shows no remorse. Key, on the other hand, had not acknowledged guilt, instead asserting he was not guilty of any crime. When the evidence of guilt is not overwhelming, the appellate court held a lack of remorse does not indicate the perpetrator is likely to engage in such conduct in the future. (*Id.* at pp. 900-901.)

Here, as explained above, the evidence that Perez was guilty of rape was very strong, and the evidence he was at least guilty of attempted rape overwhelming. Therefore, the analysis of *Key* does not support Perez's argument.

In *Leung, supra*, 5 Cal.App.4th 482, one of the defendants, Chan, argued the trial court erred in relying on the factor of lack of remorse to deny probation. Chan asserted that because he denied guilt and the evidence of guilt was conflicting, then it was improper to rely on his lack of remorse. The appellate court acknowledged the rule, but found no error occurred because the evidence of guilt was overwhelming. (*Id.* at pp. 507-508.) Similarly, the rule is not applicable in this case because, as explained above, the evidence of Perez's guilt was overwhelming.

Perez also criticizes the trial court's conclusion that he exhibited predatory behavior. Once again, the evidence supports the trial court's conclusion. This argument is based exclusively on the fact that the victim's friend called Perez to pick them up. Perez also asserts the friend asked Perez to "party with them." There is no evidence in the record to support this assertion. Moreover, even were the allegation true, Perez's decision as a 21-year-old adult to pick up a 15-year-old girl and a 16-year-old girl, provide them both with alcohol to the point of intoxication, and then attempt to have intercourse first with the 16 year old, and when she refused, with the intoxicated 15 year old who was incapable of consenting, suggests Perez's motivation when he agreed to meet with the girls was to have intercourse. This is substantial evidence that Perez indeed exhibited predatory behavior, i.e. he agreed to meet with young girls with whom he had no substantial relationship so that he could ply them with alcohol and have intercourse with them. This type of behavior meets in all respects the definition of a predatory act found in Welfare and Institutions Code section 6600, subdivision (e), the statute on which Perez relies.² We reject Perez's arguments to the contrary.

² Welfare and Institutions Code section 6600, subdivision (e) states: " 'Predatory' means an act is directed toward a stranger, a person of casual acquaintance with whom no

Perez attempts to minimize other factors also relied on by the trial court to support its decision. He suggests that since the other charge for which he was being sentenced to a concurrent sentence was a misdemeanor, it was not significant. He also asserts his juvenile probation was not formal felony probation and should not have been considered. He has provided no authority for these assertions.

Perez also asserts the trial court ignored other factors that supported the conclusion that he should be placed on probation. For example, he was out on bail for a year and fully complied with his requirements of his bail bond, he made a “heartfelt apology” to the victims for providing them with alcohol, he was helping to support his five-year-old daughter, and he had taken steps to address his issues with alcohol.

Even were we to agree with Perez’s characterization of the facts, which we do not, these factors do not mandate he be placed on probation. Moreover, we note his “heartfelt apology” completely failed to acknowledge he, at a minimum, attempted to have intercourse with an inebriated 15-year-old, and he stated in his letter to the court that he was not an alcoholic, yet he was attending Alcoholics Anonymous meetings. Such incongruities minimize these factors as mitigating circumstances.

Perez also asserts the trial court failed to fully take into consideration the trauma to his five-year-old daughter when it denied him probation. Perez fails to consider the extreme trauma his conduct caused his 15-year-old victim, which greatly outweighs any trauma his daughter might experience. We also note that if Perez was concerned about traumatizing his daughter, he should have thought about that before he decided to pick up two minor girls, provide them with alcohol, and, at a minimum, attempted to have intercourse with both of the minor girls. Once again, we emphasize that the evidence strongly suggests Perez raped the victim, an intoxicated 15 year old. Whether he

substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.”

successfully achieved penetration of the victim's vagina, or tried but failed, is simply not a significant difference.

The trial court acted well within its discretion when it determined Perez was not a suitable candidate for probation. Indeed, the evidence overwhelmingly suggests the trial court acted appropriately. Accordingly, we reject Perez's argument.

Registration as a Sex Offender

The trial court properly recognized that Perez was not subject to mandatory registration as a sex offender pursuant to section 290. It also recognized it had discretion to order him to register pursuant to section 290.006, which allows the trial court to order a defendant to register as a sex offender "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." While there is overwhelming evidence that Perez committed the offenses in this case for sexual gratification, the trial court erred because it failed to follow the dictates of this section. To impose a registration requirement pursuant to this section, the trial court was required to "state on the record the reasons for its finding and the reasons for requiring registration."

Thus, to impose a discretionary registration requirement, "the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.)

While the trial court explained at length its reasons for denying probation, and could have used the same reasoning to impose a registration requirement, it did not so state on the record. The attorney general impliedly concedes the error, but argues Perez has forfeited the argument.³ Perez argues that if the argument was forfeited, he received ineffective assistance of counsel.

We acknowledge the attorney general's argument that Perez cannot show he suffered any prejudice from defense counsel's alleged incompetent performance. This argument asserts, in essence, that since there is significant evidence to support the registration requirement, remanding the matter will be a mere formality. Nonetheless, we conclude the matter must be remanded so the trial court can make the necessary findings on the record as required by section 290.006. To do otherwise would require, in essence, this court to assume the discretion vested in the trial court. We conclude the better course is to permit the trial court to exercise its discretion in the first instance.

DISPOSITION

The judgment is affirmed, but the order requiring Perez to register as a sex offender is vacated. The matter is remanded to the trial court to permit it to reconsider the registration requirement and, if it decides to require Perez to register as a sex offender, to state its findings on the record as required by section 290.006.

³ Perez also argues the trial court abused its discretion in imposing a registration requirement utilizing much the same reasoning as used in the preceding argument. Because we conclude the matter must be remanded to permit the trial court to make the required findings on the record, we need not address this issue.